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16 UNITED STATES DISTRICT COURT

17 NORTHERN DISTRICT OF CALIFORNIA

18 MIGUEL A. CRUZ and JOHN D.
 19 HANSEN, individually and on behalf of all
 others similarly situated,

20 Plaintiffs,

21 v.

DOLLAR TREE STORES, INC.,

22 Defendant.

23 ROBERT RUNNINGS, individually, and
 on behalf of all others similarly situated,

24 Plaintiff,

25 v.

26 DOLLAR TREE STORES, INC.,

27 Defendant.

Case Nos. C 07 2050 SC and C 07 04012 SC

**DECLARATION OF MAUREEN McCLAIN
 IN SUPPORT OF DOLLAR TREE STORES,
 INC.'S OPPOSITION TO PLAINTIFFS'
MOTION FOR CLASS CERTIFICATION**

Date: May 1, 2009
 Time: 10:00 a.m.
 Dept.: Crtrm. 1, 17th Floor
 Judge: Hon. Samuel Conti

Trial Date: No Dates Set
 Complaints Filed: April 11, 2007
 July 6, 2007

1 I, MAUREEN E. McCLAIN, declare:

2 1. I have personal knowledge of the facts set forth below. If called upon as a
3 witness, I could testify competently thereto.

4 2. I am an attorney duly licensed to practice before all the courts of the State of
5 California. I am a shareholder in the firm of Littler Mendelson, counsel for Defendant Dollar Tree
6 Stores, Inc. ("Dollar Tree") in the above-entitled action.

7 3. The instant action was filed by Robert Runnings on July 6, 2007 in Alameda
8 County Superior Court. On the basis of the Class Action Fairness Act of 2005, Dollar Tree removed
9 the case to federal district court on August 7, 2007. Following Dollar Tree's request for
10 reassignment to a district court judge, the matter was assigned to the Honorable Phyllis J. Hamilton.
11 Following submission of a stipulated request for consolidation, this matter was consolidated with the
12 above-captioned Cruz/Hansen complaint before the Honorable Samuel Conti on August 31, 2007.

13 4. By letter dated July 27, 2007, Plaintiff Runnings' counsel, the law firm of
14 Scott Cole & Associates, sent a letter addressed to "Dear Store Manager" and mailed to each Dollar
15 Tree store in California, advising the Store Manager of Runnings' lawsuit, and, *inter alia*, urging the
16 recipient to contact the Cole law firm to "discuss this case and the role you might play in it."
17 Attached as **Exhibit A** are true and correct copies of the letter dated July 27, 2007, sent by
18 Runnings' counsel, Matthew R. Bainer, Esq., and the authenticating declaration of Mark Soderholm
19 which was used to submit this letter to the Court in support of Dollar Tree's *Ex Parte* Motion for a
20 Temporary Restraining Order. Dollar Tree requested, *inter alia*, that the Court require the Cole law
21 firm to mitigate any improper effects of the letter, and supervise and/or halt the Cole law firm's
22 communications with putative class members. By Order filed August 10, 2007, the Court declined
23 to issue the TRO, but expressed concerns regarding aspects of the letter. Attached hereto as **Exhibit**
24 **B** is a true and correct copy of Judge Hamilton's Order, filed August 10, 2007.

25 5. In February 2009, Mr. Bainer sent a letter to Store Manager Randy
26 Maldonado whose deposition had been noticed by Dollar Tree. Attached hereto as **Exhibit C** is a
27 true and correct copy of the February 9, 2009 letter from Mr. Bainer to Mr. Maldonado, which was
28 marked Exhibit 137 to the deposition of Randy Maldonado taken by me on February 13, 2009. The

1 letter stated "Please note that *we were not responsible* for Dollar Tree taking this course of action.
 2 However, we will attend the deposition to make any necessary objections on your behalf to the
 3 questions posed by Dollar Tree's lawyers. As a result of these events, it is imperative that we talk
 4 with you as far in advance of the deposition as possible and ask that you contact us immediately for
 5 that purpose". Attached hereto as **Exhibit D** are true and correct copies of excerpts from the
 6 deposition of Mr. Maldonado relating to the letter from Mr. Bainer. Mr. Maldonado testified that
 7 Mr. Bainer's letter had confused him. (Maldonado Depo., 173:24-175:10.) By the time Mr.
 8 Maldanado had received the letter, the date and location of his deposition had been changed to
 9 accommodate Plaintiffs' counsel's scheduling issues.

10 6. Runnings' (and now all Plaintiffs') counsel Scott E. Cole was disciplined by
 11 the California State Bar (one-year suspension stayed pending a two-year probation) on May 14,
 12 2005. Attached hereto as **Exhibit E** is a true and correct copy of The State Bar of California's
 13 attorney web page for Scott E. Cole publicly available at
 14 http://members.calbar.ca.gov/search/member_detail.aspx?x=160744.

15 7. I am also counsel for Dollar Tree in a lawsuit filed by plaintiffs Kassondra
 16 Baas and Kelly Lofquist against Dollar Tree on June 13, 2007, in the matter of *Kassondra Baas and*
 17 *Kelly Lofquist v. Dollar Tree Stores, Inc.*, United States District Court, Northern District of
 18 California, Case No. 07-03108 JSW (hereinafter "*Baas/Lofquist*"), alleging, *inter alia*, that Dollar
 19 Tree altered the time records of its employees, thus failing to compensate the employees for all the
 20 time actually worked. The named plaintiffs in *Baas/Lofquist*, were assistant managers at the Dollar
 21 Tree store managed by John D. Hansen, named Plaintiff in the instant action. Essentially, the named
 22 plaintiffs in *Baas/Lofquist* alleged that their Store Manager, Plaintiff Hansen, altered their time
 23 records such that they were not compensated for the overtime hours they worked. Both the plaintiffs
 24 in *Baas/Lofquist* and Plaintiff Hansen in this case were simultaneously represented by the same
 25 attorney, Jeremy R. Fietz of the Edgar Law Firm, who was until recently proposed class counsel in
 26 the instant action. Starting in November 2007 (and repeatedly thereafter), I raised to Mr. Fietz
 27 Dollar Tree's view that he had a conflict of interest which precluded him from representing Plaintiffs
 28 John Hansen and Miguel Cruz in this action and plaintiffs Baas and Lofquist in the separate action.

Attached hereto as **Exhibit F** is a true and correct copy of a letter I wrote to Mr. Fietz dated November 20, 2007 setting forth the nature of the conflict. Dollar Tree raised that conflict as part of its opposition to the *Baas/Lofquist* February 29, 2008 motion for class certification. By Order dated April 1, 2008, the Honorable Jeffrey White of this Court denied the *Baas/Lofquist* motion for class certification, by holding: (1) Mr. Fietz had a conflict in simultaneously representing Baas and Lofquist in their case, and Plaintiff Hansen in the instant action; (2) Mr. Fietz could not have the conflict waived because such a waiver would be required from all putative class members in the *Baas/Lofquist* matter; and (3) the *Baas/Lofquist* plaintiffs had failed to demonstrate their counsel, Mr. Fietz, would adequately represent the class as required by Federal Rule of Civil Procedure 23(a)(4), due to Mr. Fietz's aforementioned conflict. Attached hereto as **Exhibit G** is a true and correct copy of the Judge White's Order in *Baas/Lofquist*, dated April 1, 2008, setting forth the above facts and denying plaintiffs Baas/Lofquist's motion for class certification. Attached as **Exhibit H** is a true and correct copy of Judge White's subsequent Order dated December 19, 2008 again denying class certification in *Baas/Lofquist v. Dollar Tree Stores, Inc.*, this time on the grounds that Baas and Lofquist could not satisfy the predominance criterion of Rule 23(b)(3) and a class action was not proper under Rule 23(b)(1).

8. Following Judge White's April 1, 2008 Order in the *Baas/Lofquist* matter, I had numerous communications with Mr. Fietz stating Dollar Tree's position that the Edgar Law Firm should withdraw from representing plaintiffs in both cases. On July 2, 2008, new counsel substituted for plaintiffs in the *Baas/Lofquist* matter. While Mr. Fietz represented that the Edgar Law Firm would likely withdraw from representing Cruz and Hansen (see Supplemental Joint Case Management Status Conference Statement dated July 25, 2008, pp. 3:22-4:2), such withdrawal did not occur until January 26, 2009 when Mr. Cole's firm became the sole counsel for Plaintiffs. Attached hereto as **Exhibit I** is a true and correct copy of the Supplemental Joint Case Management Status Conference Statement dated July 25, 2008 and the January 26, 2009 Notice of Substitution of Counsel.

9. On October 11 and November 1, 2007, I took the deposition of Plaintiff Hansen in this matter. Attached hereto as **Exhibit J** are true and correct copies of excerpts from

1 Hansen's deposition transcript relating to the conflict issue referenced above. Hansen initially
 2 testified that he might have changed an employee's punch once to avoid overtime pay (Hansen
 3 Depo., 270:15-20) but changed that testimony, following a conversation with Mr. Fietz, to state that
 4 he did not recall whether it was "once or twice or anything." (Id., 277:21-278:7; 285:15-286:14).
 5 Hansen also testified that it was Dollar Tree policy to pay for all time worked (Id., 198:8-10; 648:13-
 6 17), that he knew any alteration to deprive employees of pay for time worked was wrong (Id.,
 7 270:24-271:7) and that one could not tell from an altered punch whether the alteration was made to
 8 correctly reflect time worked or to reduce time worked. (Id., 652:2-8).

9 10. On March 25, 2008, Dollar Tree propounded Interrogatories, Set One, and
 10 Request for Production of Documents, Set One, to Plaintiff Robert Runnings in the instant action.
 11 The written discovery addressed whether Runnings had in his possession and/or had disclosed wage
 12 information of Dollar Tree employees in his district. In response, Runnings produced a Dollar Tree
 13 document entitled "Active Associate Report" and responded that he had a discussion with Dollar
 14 Tree Store Manager Elaine Edwards concerning the document. Attached hereto as **Exhibit K** is a
 15 true and correct copy of Plaintiff Robert Runnings' Further Responses to Defendant's
 16 Interrogatories, Set One, dated October 3, 2008. Runnings also had a conversation with another
 17 Dollar Tree Store Manager, Jesus Martinez, concerning the Report. Attached as **Exhibit L** is a true
 18 and correct copy of the Declaration of Jesus Martinez obtained on March 5, 2008.

19 11. I am also counsel for Dollar Tree in a lawsuit filed by former Dollar Tree
 20 Store Manager Diane Fierro on January 22, 2008 with the Santa Clara County Superior Court, Case
 21 No. 108CV103712. Fierro's complaint asserted six causes of action against Dollar Trees Stores,
 22 Inc., James Dunaway and/or Roselyn Hammond, three of which raised Fierro's contention that she
 23 was misclassified as exempt and hence entitled to overtime for work at Dollar Tree in the three years
 24 preceding filing of her complaint. Attached hereto as **Exhibit M** is a true and correct copy of
 25 Fierro's complaint. See, the fourth through sixth causes of action. Dollar Tree answered the
 26 complaint on March 14, 2008.

27 a. Substantial discovery has been taken by both sides in the Fierro matter.
 28 I conducted Ms. Fierro's deposition on April 14, 2008. At the deposition, Fierro produced

1 documents in response to Dollar Tree's request for production of documents served with the
2 deposition notice. Plaintiff to date has taken the depositions of several Dollar Tree employees:
3 Regional Director Roselyn Hammond, Zone Sales Director Jim Dunaway, Manager of Field
4 Training Development Terrie Peters and District Manager Woody Clifford. A significant portion of
5 the discovery has related to the classification issue.

6 b. On September 4, 2008, Dollar Tree and individual defendant Roselyn
7 Hammond ("Defendants") filed their Motion for Summary Judgment/Adjudication. Dollar Tree's
8 motion and Fierro's opposition addressed the classification issue. On November 19, 2008, the
9 Honorable Kevin J. Murphy issued his Order on Defendants' motion denying the summary
10 adjudication of Fierro's fourth, fifth and sixth causes of action concerning her exempt status.
11 Attached hereto as **Exhibit N** is a true and correct copy of Judge Murphy's Order Re: Motion For
12 Summary Judgment/Adjudication filed on November 19, 2008. Judge Murphy found that
13 Defendants had met their initial burden to show Fierro was an exempt employee. "Plaintiff does not
14 dispute that she was a Store Manager responsible for managing individual stores who regularly
15 supervised two or more employees and who could (and did) hire, fire and discipline employees."
16 (Exhibit N, 7:12:14.) However, the court also found that Plaintiff had raised a material issue of fact
17 in claiming that her pre-litigation statements certifying that she had in fact performed exempt
18 functions for a majority of her work time were not true. (*Id.*, 7:22-8:8.) Approximately 100 pages of
19 motion argument and factual support filed relative to the Fierro Motion for Summary
20 Judgment/Adjudication addressed the exempt classification issue.

21 c. Following Judge Murphy's decision, the parties continued to conduct
22 investigation and discovery, including both parties' identification of witnesses who will describe
23 how Fierro performed her job duties. Trial is set to commence in late July 2009.

24 12. On January 18, 2008, Dollar Tree filed its motion for summary
25 judgment/adjudication as to Plaintiffs Hansen and Runnings. Attached hereto as **Exhibit O** is a true
26 and correct copy of this Court's July 8, 2008 Order Denying Defendant's Motions for Summary
27 Judgment/Adjudication.

1 Executed in San Francisco, California on April 7, 2009. I have read this Declaration
2 and hereby declare, under penalty of perjury under the laws of the United States of America, that it is
3 true and correct.

4
5 /s/ Maureen E. McClain
6 MAUREEN E. McCLAIN

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